

1997

# Francis J. Zambito v. State of Utah : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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FRANCIS J. ZAMBITO, :

Defendant/Appellant, : Case No. 970654-CA

v. : Priority No. 2

STATE OF UTAH, :

Plaintiff/Appellee. :

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BRIEF OF APPELLANT

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APPEAL FROM A JUDGEMENT AND COMMITMENT FOR  
THEFT A THIRD DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN.  
§ 76-6-404, ENTERED IN THE THIRD DISTRICT COURT  
IN AND FOR SUMMIT COUNTY, STATE OF UTAH,  
THE HONORABLE JUDGE PAT BRIAN, PRESIDING

---

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UTAH COURT OF APPEALS  
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## TABLE OF CONTENTS

TABLE OF CONTENTS .....	i
TABLE OF AUTHORITIES .....	ii
JURISDICTIONAL STATEMENT .....	1
STATEMENT OF ISSUE FOR REVIEW.....	1
STATUTES, RULES, CONSTITUTIONAL PROVISIONS .....	1
STATEMENT OF THE CASE .....	2
STATEMENT OF FACTS .....	3
SUMMARY OF ARGUMENT .....	3
ARGUMENT .....	4
FRANCIS ZAMBITO WAS NOT COMPETENT AT THE TIME OF TRIAL AND THEREFORE HIS CONVICTION SHOULD BE OVERTURNED AND THE CASE REMANDED FOR A NEW TRIAL OR ARREST OF JUDGMENT.....	4
ORAL ARGUMENT; PUBLICATION OF OPINION .....	8
CONCLUSION .....	8
ADDENDA .....	

Addendum A: Forensic Psychological Evaluation of Defendant

## TABLE OF AUTHORITIES

### STATE CASES

<u>State v. Robertson</u> , 932 P.2d 1219 (Utah 1997).....	4
<u>State v. Young</u> , 780 P.2d 1233, 1235-38 (Utah 1989).....	4,7
<u>State v. Verde</u> , 770 P.2d 116 (Utah 1989).....	7

### STATE STATUTES

Utah Code Ann. §76-6-404.....	1
Utah Code Ann. §77-15-1 <i>et seq.</i> (1997).....	4,5
Utah Code Ann. §78-2a-3(e) (Supp. 1996).....	1

### STATE PROCEDURAL RULES

Rule 3(a), Utah Rules of Appellate Procedure.....	1
Rule 23, Utah Rules of Criminal Procedure.....	7

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Plaintiff/Appellee.	:	

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BRIEF OF APPELLANT

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**JURISDICTION**

This is an appeal from a judgement and commitment of Theft, a Third Degree Felony of Utah Code Ann. §76-6-404, entered in the Third District Court, Summit County, State of Utah.

Jurisdiction is conferred on this Court pursuant to Utah Code Ann. § 78-2a-3(e) (1996) and Rule 3 of the Utah Rules of Appellate Procedure.

**STATEMENT OF THE ISSUE AND STANDARD OF REVIEW**

Dr. Francis Zambito, who was determined to be incompetent to proceed prior to sentencing, was incompetent at the time of trial and therefore his conviction should be reversed.

**DETERMINATIVE CONSTITUTIONAL AND STATUTORY PROVISIONS**

Determinative constitutional provisions are those of Due Process of Law as a basis for the provision of competency to proceed to trial.

## **STATEMENT OF THE CASE**

Defendant, Dr. Francis Joseph Zambito, hereafter referred to as "Dr. Zambito" was arraigned on May 8, 1995, before Judge Pat B. Brian in Coalville, Utah for the charge of Theft, a Third Degree Felony (R. 25 ).

The charge arose from Dr. Zambito taking rental skis from the Stein Erickson Resort in Deer Valley and giving the skis away as gifts rather than returning them to the lodge (R. 277-280). On June 15, 1995, Dr. Zambito proceeded to trial with Ruth Wagner, a public defender in Summit County representing him and he was found guilty by a jury with sentencing set for September 8, 1995 (R. 89, 105-112, 384).

For various reasons the sentencing was continued and Dr. Zambito was represented by four different attorneys prior to sentencing. On June 19, 1996 Dr. Zambito's privately retained counsel filed a motion for Petition for Inquiry Into Mental Competency to Proceed (R. 118). On November 11, 1996 counsel informed the court that Dr. Zambito was in a mental hospital in California (R. 128). Dr. Zambito did not return to Utah to finalize his case and have his sentence imposed for the theft conviction until the fall of 1997 (R. 187).

At that time the issue was raised that Dr. Zambito was not competent to proceed to sentencing until he was medicated and monitored by medical staff (R. 191-208). It was determined by counsel and the court that after being medicated and monitored and receiving visits by medical personnel that Dr. Zambito was competent to proceed for sentencing (R. 191-208, sealed documentation including letter from Summit County Doctor).

Dr. Zambito was sentenced to one year in the county jail, fines, restitution and counseling (R. 215, 16). Dr. Zambito now appeals his conviction on the basis that he was not competent at the time of trial.

### **STATEMENT OF FACTS**

The facts of the case are not relevant to the determination of this case. At issue is whether Dr. Zambito was competent to proceed to trial. To determine this issue counsel refers the Court to the Forensic Psychological Evaluation of Dr. Linda J. Gummow, Ph.D., who evaluated Dr. Zambito after trial but prior to sentencing. This Report is in the record but under seal. However, it is provided in this brief as Addendum A.

Prior to sentencing, the recommendations of Dr. Gummow were adhered to and it was determined at the time of sentencing that Dr. Zambito was at that time competent to proceed (R. 191-208).

### **SUMMARY OF THE ARGUMENT**

A defendant in a criminal case must be competent to proceed in order to be tried and convicted within the realm of the federal and state constitutional protections. In this case it was determined that the defendant, Dr. Zambito, was not competent to proceed at a point after his trial but prior to sentencing. At the time of trial Dr. Zambito's mental health was the same if not worse than the time of the evaluation. Therefore, if he was not competent to proceed to sentencing then he was not competent to be tried in the



first place. On this basis counsel asserts that Dr. Zambito's conviction should be overturned, that he be evaluated now to determine if he is competent and that he be given a new trial or the case be remanded for an arrest of judgment under the Utah Rules of Criminal Procedure.

## **ARGUMENT**

### **DR. ZAMBITO WAS NOT COMPETENT TO PROCEED TO TRIAL; THEREFORE HIS CONVICTION SHOULD BE REVERSED.**

Due process of law forbids the trial of an incompetent person and requires that if evidence of incompetence arises during the course of the proceedings that the issue be addressed in a manner to assure the court that the defendant is able to proceed. See State v. Robertson, 932 P.2d 1219 (Utah 1997) and State v. Young, 780 P.2d 1233, 1235-38 (Utah 1989).

State statute provides the same rule, "No person who is incompetent to proceed shall be tried or punished for a public offense." §77-15-1 (1997).

A person is deemed incompetent under state law if he:

...is suffering from a mental disorder or mental retardation resulting either in:  
(1) his inability to have a rational and factual understanding of the proceedings against him or of the punishment specified for the offense charge; or  
(2) his inability to consult with his counsel and to participate in the proceedings against him with a reasonable degree of rational understanding. See §77-15-5 (1997).

(4) The experts shall in the conduct of their examination and in their report to the court consider and address, in addition to any other factors determined to be relevant by the experts:

(a) the defendant's present capacity to:

(I) comprehend and appreciate the charges or allegations against him;

- (ii) disclose to counsel pertinent facts, events, and states of mind;
- (iii) comprehend and appreciate the range and nature of possible penalties, if applicable, that may be imposed in the proceedings against him;
- (iv) engage in reasoned choice of legal strategies and options;
- (v) understand the adversary nature of the proceedings against him;
- (vi) manifest appropriate courtroom behavior; and
- (vii) testify relevantly, if applicable;
- (b) the impact of the mental disorder, or mental retardation, if any, on the nature and quality of the defendant's relationship with counsel;
- (c) if psychoactive medication is currently being administered:
  - (i) whether the medication is necessary to maintain the defendant's competency; and
  - (ii) the effect of the medication, if any, on the defendant's demeanor and affect and ability to participate in the proceedings.
- (5) If the expert's opinion is that the defendant is incompetent to proceed, the expert shall indicate in the report:
  - (a) which of the above factors contributes to the defendant's incompetency;
  - (b) the nature of the defendant's mental disorder or mental retardation and its relationship to the factors contributing to the defendant's incompetency;
  - (c) the treatment or treatments appropriate and available; and
  - (d) the defendant's capacity to give informed consent to treatment to restore competence. § 77-15-5 (1997).

Appellate counsel was not trial counsel for Dr. Zambito. Moreover, the record is scant on comments made by Dr. Zambito which would indicate through comments or correspondence whether Dr. Zambito's competency was at issue. However, the report done on Dr. Zambito, after trial but prior to the sentencing determined that Dr. Zambito was not competent to proceed. If Dr. Zambito was not competent prior to sentencing, he must assuredly was not competent at trial as the conditions of his mental state had not changed.

The report of Dr. Gummow will be quoted here but should be read in its entirety for a full understanding of how the evaluation was performed, what information was

relied upon and on what basis the final conclusions were made. The report was prepared in anticipation of initial criminal litigation in Wasatch County as well as sentencing in Summit County. The criminal charges in Wasatch County were dropped and Dr. Zambito was released from custody in their jurisdiction. He is still under the original sentence imposed in Summit County to serve one year in jail as well as the other penalties imposed. Additionally, Dr. Gummow's report provides who was interviewed, the length of time, the reason for referral and the other requirements set forth in the Utah statute.

Dr. Gummow found that Dr. Zambito was not competent to proceed. Dr. Gummow found specifically that Dr. Zambito suffered from a Bipolar disorder that had worsened over the years. His disorder combined with manic and depressed episodes had gotten out of control to the point that he was cycling rapidly. Dr. Gummow determined that in order for Dr. Zambito to be determined competent for a criminal case he would have to have four things occur:

- 1) Regular psychiatric follow up
- 2) Lithium levels checked regularly
- 3) Lithium levels at a therapeutic level for 60 days
- 4) Psychiatric release stating that Dr. Zambito was clinically stable and is fully compliant with appointments and medication.

The diagnosis of Dr. Zambito is very helpful in describing Dr. Zambito's activity when meeting with his various appointed and retained counsel, specifically, Mr. Skordas and current counsel, prior to medication.

Dr. Zambito was unable to track any conversations that were engaged in regarding his criminal case until he was properly medicated over a period of time. At the time of trial Dr. Zambito was not on medication, not seeing a therapist and was not being monitored by medical personnel.

If trial counsel knew or should have known of Dr. Zambito's incompetence she should have brought that issue to the attention of the court. Moreover, by not doing so counsel may have been ineffective in her assistance to him at trial.

In the event that this Court must, the Court may resort to the doctrines of plain error and ineffective assistance of counsel in correcting the due process violation stemming from the trial of Dr. Zambito while he was incompetent. See State v. Verde, 770 P.2d 116 (Utah 1989) (discussing plain error and ineffective assistance of counsel doctrines).

The need to address Dr. Zambito's competency should have been plain to both the trial court and to trial counsel. Both performed in an objectively deficient manner in not addressing the issue and there is a reasonable probability of a different result in the absence of the error (Dr. Zambito may not have been convicted at all or found guilty and mentally ill) if the proper competency proceedings had been followed. See Verde, *supra*.

However, even if there was no evidence of Dr. Zambito's incompetence which arose until after trial, the court should have instigated competency proceedings under the doctrine of State v. Young, and should have ordered an arrest of judgment under

rule 23 of the Utah Rules of Criminal Procedure. See State v. Cantu, 750 P.2d 591, 594-95 (Utah 1988).


**ORAL ARGUMENT: PUBLICATION OF OPINION**

The Appellant does request oral argument and a published opinion in this case.

**CONCLUSION**

Based upon the foregoing arguments the Appellant requests that this Court vacate his conviction for theft and remand either for an Arrest of Judgment under Rule 23 of the Utah Rules of Criminal Procedure or for a new trial.

DATED this 19th April, 1998.

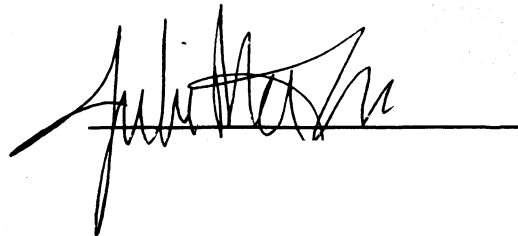
  
Julie McPherson  
Attorney for Appellant

MAILING CERTIFICATE

I hereby certify that I hand-delivered or mailed, first class postage prepaid, a true and correct copy of the foregoing brief to:

J. FREDERIC VOROS, JR.  
Assistant Attorney General  
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Salt Lake City, Utah 84114-0854  
Attorneys for Appellee

Dated this 22 day of April, 1998.

A handwritten signature in black ink, appearing to read "J. Frederic Voros, Jr.", is written over a horizontal line.

## **ADDENDA**

## **ADDENDUM A**





**Conger & Gummow**  
247 E. 2100 S.  
Salt Lake City, UT 84115

RECEIVED

JUL 20 1996

Watkins, Dunn  
& Watkins

### Forensic Psychological Evaluation

**Examinee:** Francis J Zambito, DDS

**Dates of Evaluation:**  
7/12, 7/16/96

**Age:** 42

**Date of Report:** 7/17/96

**Case #:** 9640004

**Defense:** Gregory Skordas

**Prosecutor:** D K Pullan

**Evaluator:** Linda J Gummow, Ph D

### Materials Reviewed:

Police Report, (record review = 25 hour)

### Individuals Interviewed:

Francis J Zambito (2 5 hours interview 2 5 hours testing), (report preparation = 2 hours), Gregory Skordas (defense attorney 25 hour), David Pinkston (attorney civil case 25 hour) and Jennifer Zambito (wife, 25 hour) Dr Zambito was evaluated in the examiner's office See address above

### Reason for Referral:

Dr Zambito has been charged with four counts of Insurance Fraud, a second degree felony, and one count of Theft by Deception, a second degree felony He was initially charged with five counts of Possession of a Firearm by a Restricted Person, but these charges were said to have been dropped There were two referral questions posed The first was to examine Dr Zambito's competency to stand trial 1) whether the defendant has a rational and factual understanding of the proceedings against him or the punishments specified for the offenses charged and 2) whether the defendant is able to consult with counsel with a reasonable degree of rational understanding as per Utah Code 77-15-2 The second was to determine Dr Zambito's mental

**CONFIDENTIAL EVALUATION: RELEASE TO THE EXAMINEE WITHOUT CLINICAL  
SUPPORT IS NOT RECOMMENDED**

state at the time of the alleged offenses, whether the defendant had the mental state necessary as an element charged as per Utah Code Ann. 77-14-4(2).

### **Consent to Proceed with Examination:**

The reason for the evaluation was explained to Dr. Zambito. The limited confidentiality of the information provided, the distribution of the written report, the requirement that the examiner report honestly on all of the findings, and the independence of the examiner were explained. The defendant was informed that the information collected would be used to determine his mental state and did not bear upon his guilt or innocence regarding the charges. Dr. Zambito read the forensic disclosure statement before any questions were asked, but he did not want to sign the consent form. He stated his concern that the results of the competency examination might be obtained by individuals who are involved in pending civil litigation. He consulted with his attorney before signing the consent form.

### **Competency:**

The examiner's opinion relative to the defendant's competency are presented here. The information supporting these conclusions is summarized in the following sections.

Dr. Zambito does not meet the Utah standard for competency to proceed. He meets some but not all of the standards. Specifically, Dr. Zambito is able to comprehend the nature and circumstances of the charges against him. He appreciates the significance and seriousness of the charges. He is able to understand that the process is adversarial, and he comprehends and appreciates the range and nature of the possible penalties if convicted of the charges. He should be able to manifest appropriate court room behavior if his clinical condition does not change. If stressed, he could have difficulty controlling anger and agitation. He is able to disclose facts, events, and states of mind to counsel. He does tend to confuse dates and he may not remember all facts secondary to the significant emotional disturbance.

Dr. Zambito's limitations are in two areas. Dr. Zambito is currently unable to engage in a reasoned choice of legal strategies and options. Due to mental illness, he is not able to see the charges realistically and to work on a consistent defense strategy with his attorney. He is also limited in his ability to testify relevantly. Although he is an intelligent man, the fact that his illness is not effectively treated makes it likely that he will answer questions too quickly, lose track of a question, or become irritable and suspicious without cause.

Dr. Zambito's limitations with regard to competency to stand trial stem from a poorly controlled Bipolar Disorder. Dr. Zambito experiences striking periods of hypomania associated with poor judgment and impulse control as well as periods of depression characterized by withdrawal and extreme lethargy. Dr. Zambito was diagnosed with this disorder several years ago, and he was given medication by a doctor in California. He has not been seen by this doctor for several months, and he has not had medication blood levels drawn in six months. Dr. Zambito's clinical condition was seen as worsening. He has not been able to afford the needed medications, and he may not be taking the medication consistently.

Medication is necessary to return Dr. Zambito to full competency and to maintain competency. The medication will improve Dr. Zambito's presentation considerably. His concentration, focus, memory, and emotional control should improve when medication is at optimal levels. He should not appear in court until the conditions for monitoring his medication described in the Clinical Impression section of the report have been met.

There are effective treatments available for the type and severity of disorder experienced by Dr. Zambito. It should be noted that some patients with a bipolar diagnosis cycle frequently as does Dr. Zambito. Some individuals do not gain complete or lasting control of this disorder.

Dr. Zambito is aware of the need to resume psychiatric treatment. He is currently competent to give informed consent to treatment to restore competency.

### **Diminished Capacity:**

Dr. Zambito was aware that he had filed several insurance claims, but it was his belief that the claims were valid (according to account given this examiner). If Dr. Zambito filed an incorrect claim, it is possible that he was not aware that he still possessed the items. He has been quite disorganized, and he may have misplaced items, misread a form, or been careless in his documentation. Individuals in a manic episode often misperceive and misremember events. During these episodes, they are convinced of the rightness of their actions, and they are unable to recognize alternate perceptions or to ask others to validate their perceptions. This is particularly true when the individual manifests symptoms of paranoia and is experiencing hallucinations. These symptoms were present in Dr. Zambito. Individuals with a Bipolar diagnosis are prone to financial misjudgments during hypomanic episodes. Since the Diminished Capacity defense as recently defined by the Utah Supreme Court suggests that knowing is an important element to a Diminished Capacity defense, Dr. Zambito's situation appears to meet the minimal requirement for this defense. Dr. Zambito was a successful individual until he developed this devastating mental illness. Dr. Zambito would qualify for a Guilty and Mentally Ill defense without reservation.

### **History and Identifying Information:**

The history was derived from an interview with Dr. Zambito. Dr. Zambito was a good, but somewhat tangential, historian. Dr. Zambito is a 42 year old married Caucasian male who is living with his third wife, Jennifer, and three children in Midway, Utah.

Dr. Zambito was born and reared in Auburn, New York. He is the youngest of two children (sister seven years older). Dr. Zambito was raised by his natural parents. His father was a contractor and barber who died when Dr. Zambito was twelve years old. Dr. Zambito's mother was employed as a seamstress.

Dr. Zambito graduated from Auburn High School in 1971. He obtained a Bachelor of Science degree in Biology in 1975 from Loyola Marymont University in Los Angeles. He obtained a degree in dentistry from The University of the Pacific Dental School in 1975. He completed the four year curriculum in three years.

Dr. Zambito has been married three times. He was first married at age 23. There were no children from this marriage. He married for the second time at age 30. There were three children from this marriage. Dr. Zambito and his ex-wife have joint custody, but the children live with their mother. Dr. Zambito tries to visit them frequently in California, but this has become more difficult due to financial problems. Dr. Zambito married his current wife in 1995. They have one child. She has two children from a prior marriage who also live with the couple.

Dr. Zambito's principal occupation has been dentistry. He practiced general dentistry, and he was licensed in California, Arizona, Utah, and Oregon. He had a successful dental practice in the bay area, and he had two other dentists in his practice and 20 employees. Three of Dr. Zambito's licenses to practice dentistry are lapsed. Dr. Zambito was receiving disability payments secondary to an inability to practice dentistry. He last worked as a dentist in 1993. Mrs. Zambito has worked as a paralegal, but she is currently unemployed.

Dr. Zambito reported a history of normal birth and development. He had severe allergies as a child (pollen and dust), but these resolved after a series of injections. He no longer has allergy problems. Dr. Zambito denied a history of loss of consciousness, serious falls, illnesses associated with high fevers, injuries in automobile accidents, or surgery. He did rupture an Achilles tendon as an adult, but he reported no residual disability. Dr. Zambito also damaged nerves in his left wrist when replacing glass in a storm window three years ago. He has

numbness in several fingers of the left hand, and he now writes and does many activities with his right hand. He believes that the injured hand is recovering.

Dr. Zambito reported that his father is deceased secondary to pneumonia. His mother was described as in good health.

Dr. Zambito reported that he did not drink alcohol in any quantity until he was 35 or 36 years old. He began drinking alcohol in a serious way in 1992. (Dr. Zambito noted that it is difficult for him to recall exact dates of events, so the dates are estimates.) Dr. Zambito stated that he began to drink wine on an intermittent basis (1/2 bottle wine at a time) to help him sleep. He denied the use of other drugs or the abuse of medications. Dr. Zambito was treated for four days at the St. Johns' drug and alcohol treatment program in Sacramento California. He had been encouraged to go into treatment by friends and staff who were concerned about him. He did not believe that he had an alcohol problem at that time, and he left the program without really getting involved in it. Dr. Zambito denied current significant use of alcohol or drugs.

Dr. Zambito reported a significant family history of depression. His grandfather committed suicide in his late 60's. His mother was reported to have a history of severe depression.

Dr. Zambito reported that his dental practice was quite successful, and he was the consulting dentist for several professional sports franchises in the Bay area. He enjoyed a luxurious life style with a nice home, large savings account, and luxury cars. Dr. Zambito stated that he began to have recognizable mood swings in 1990 or 1991. He had periods when he did not get out of bed for "days at a time", and he called his office to cancel patients. These periods alternated with periods when he "got over involved" with outside activities or spent large sums of money. In a two day period he bought two luxury cars and a new home. He became involved in numerous community and professional activities, but he was not always able to follow through with his commitments. During these active periods, he found it difficult to sleep, and it was not unusual for him to sleep only a few hours a night. The longest period that he could recall without sleep was 6 or 7 days. During the first year of the disorder, Dr. Zambito experienced one major cycle of the disorder.

Dr. Zambito sought treatment from his family doctor. It was thought that he was reacting to the stress of his practice, and sedative and antidepressant medications were prescribed. These medications were ineffective, and Dr. Zambito began drinking alcohol intermittently to help him sleep. Dr. Zambito reported that his friends and colleagues became more and more concerned about him, and he entered the alcohol treatment program without believing that it was a significant problem for him. After leaving the treatment program, Dr. Zambito practiced for approximately one more year, but he described the mood swings as more severe and frequent. He was referred to a psychiatrist, Dr. Hirsch for evaluation and treatment. The evaluation included a number of neurological tests. These were reported to be negative. After the evaluation, Dr. Zambito was diagnosed as having a Bipolar Affective Disorder, and he was placed on Lithium and Prozac. Dr. Zambito was hospitalized for ten days in an inpatient psychiatric facility in California.

Dr. Zambito stated that concerned employees contacted the state regulatory agencies in California. Dr. Zambito's practice was evaluated, and it was determined that he was over prescribing controlled medications to professional athletes. Felony charges were filed against him, but he pled guilty to a misdemeanor charge. He agreed to surrender his license to practice dentistry in California. He was advised to take disability leave from his practice, and he agreed to do so. Dr. Zambito stated that he was not tracking his practice and he was not seeing the patients as he was supposed to do.

During the last years of his practice, Dr. Zambito changed disability carriers, leaving the carrier of his professional organization. He is not clear why he made this switch in coverage. When he filled out the application form, he reported that he had not undergone drug or alcohol treatment because he spent only four days in the program and because he did not believe that he had a problem in this area. The disability carrier paid Dr. Zambito for a period of time, and they then filed a half a million dollar law suit against him, claiming that he had deliberately falsified the

coverage form. A series of legal battles ensued. The most recent was in the Federal Bankruptcy Court. Dr. Zambito had a .5 million dollar judgment entered against him. This decision is being appealed because Dr. Zambito was not allowed to enter evidence about his mental condition at the time of the signing of the document.

After leaving California, Dr. Zambito relocated to the Midway, Utah area, purchased a home, and married a paralegal from one of the firms that was assisting him with legal matters. Dr. Zambito had a number of criminal charges pressed against him. These will be described in a latter section.

### **Current Complaints:**

Physically, Dr. Zambito reported that he is in good health. He denied problems with his senses of vision, hearing, smell and taste (other than metallic taste associated with Lithium). He denied muscle weakness and spasm, but he does have intermittent hand tremulousness (associated with Lithium). He reported an occasional dizziness/balance disturbance. He stated that his motor coordination was normal, and he is able to play tennis. He denied abnormal skin sensations, seizures, or blackouts. He occasionally has problems with his lower back, and this can limit activity for two to three days. He reported constant diarrhea of unknown etiology. Mrs. Zambito reported that her husband has frequent stomach problems of unknown cause. Dr. Zambito does not sleep well, and he has frequent nightmares. Dr. Zambito described some of his dreams as quite real, and it is sometimes difficult for him to distinguish dream material from reality. Mrs. Zambito indicated that her husband now sleeps in another room so that he does not awaken her.

Dr. Zambito reported that he has a significant headache every three days. The headaches were described as in the temple region. These are not associated with visual disturbances, nausea, or photophobia. He has had these headaches for one year. He has not found a medication that is effective. His usual treatment is to lie down and put a towel over his eyes. He reported that the headaches interfere with his ability to concentrate.

Cognitively, Dr. Zambito stated that his memory varies from time. He reported that his memory is great sometimes, but poor at other times. Dr. Zambito reported his belief that his memory has worsened during the last year. Dr. Zambito reported that it is difficult for him to focus his attention, but this and his ability to process information vary from time to time. It is difficult for Dr. Zambito to make practical decisions. He described his speech as more rapid, and he sometimes has problems conceptualizing what he wishes to say. He has variable ability to recall what he reads. He described his planning and organizational skills as "terrible."

Emotionally, Dr. Zambito stated that he is having difficulty "shutting my mind off." He worries about his children and what has happened. During these periods, he breathes rapidly, experiences racing heart, and perspires. Dr. Zambito described no specific fears or phobias. He described periods of agitation and irritability which were said to be worsened when he does not take Prozac. Dr. Zambito denied a history of suicidal ideation or suicide attempts. Dr. Zambito reported intermittent auditory hallucinations. Dr. Zambito hears voices as if a radio were playing. It is impossible for him to understand what the voices are saying. He reported that he has this experience approximately three times per year. In addition to periods when he sleeps for several days to a week, Dr. Zambito has had periods of sleeplessness (described previously). He has been convinced that he was powerful enough to influence happenings in the world (could control events in Peru.)

Dr. Zambito estimated that his mood cycles every four or five days. He stated that his mood fluctuations vary. His moods were said to be under somewhat better control recently. Recently he has been sleeping approximately three hours per night. His last Lithium level was done six months ago.

Dr. Zambito reported that he is suspicious of others. Dr. Zambito believes that the law firm representing him in the civil case has over billed him and has conspired with others to bring his civil suit to a bad end.

Dr. Zambito is not being followed by a local psychiatrist. His medications are ordered by Dr. Peter Hirsch of Torrance, California. He has ordered that Dr. Zambito take 80 mg of Prozac per day and 1400 mg of Lithium. Dr. Zambito has not been taking medication regularly. He stated that he cannot afford the expense. Dr. Hirsch has informed Dr. Zambito that he cannot continue to treat him unless Dr. Zambito comes in for regular follow up visits. When Dr. Zambito's home is sold, he plans to move to California and receive regular medication follow up there. Dr. Zambito remarked on several occasions that he is aware that he has a psychiatric illness, but he has not fully accepted this. He made a distinction between awareness and full acceptance.

### **Charges:**

Dr. Zambito was charged with four counts of Insurance Fraud, one count of Theft by Deception, and five counts of Weapons Possession by a restricted Person. It was originally thought that Dr. Zambito was a convicted felon. Dr. Zambito indicated that the weapons charges have been dropped. The police report indicated that Dr. Zambito had filed four insurance claims, but that some of the items that he reported stolen had been located in his home and a storage unit. It was also alleged that Dr. Zambito had a dental machine in his home that belonged to another individual.

### **Interview with Gregory Skordas:**

Gregory Skordas, JD was interviewed by telephone on July 16, 1996. Mr. Skordas is representing Dr. Zambito regarding the pending criminal charges. Mr. Skordas reported that he has had extreme difficulty working with his client. The most significant issue is Dr. Zambito's emotional lability. He will work through an issue with Dr. Zambito and believe that a course of representation has been set, but the minutes to hours later Dr. Zambito will call and state that this approach is not acceptable. Second, Dr. Zambito does not appear to appreciate the risks of going to trial. He sees himself as being vindicated, and he does not consider offers to resolve the matter other than going to trial. Third, Dr. Zambito is quite emotional, crying and saying that Mr. Skordas is a great friend and then believing that Mr. Skordas is conspiring against him. Mr. Skordas reported that his client believes that there is a conspiracy against him in Wasatch County. He believes that the police have a special relationship with an informant. Dr. Zambito has difficulty focusing on the issues at hand, and he has to be redirected and asked to focus. He comes to court in inappropriate clothing, and he does not appear to fully appreciate the social norms of the court situation.

### **Interview with David Pinkston:**

David Pinkston was interviewed by telephone on July 16, 1996. Mr. Pinkston is working with Dr. Zambito on the civil case regarding his disability insurance. He stated that individuals at this firm have had difficulty representing Dr. Zambito. Problems with focus and control were an issue. Also an issue was trust. Dr. Zambito brings up the issue of their commitment to his case, and it is difficult for them to represent him in an atmosphere of distrust. His behavior in court was poor and unfocused.

### **Interview with Jennifer Zambito:**

Mrs. Jennifer Zambito was interviewed in the examiner's office on July 16, 1996. Mrs. Zambito has known her husband for one and one half years. Mrs. Zambito stated that her husband has a number of problems: 1) sleep disturbance; 2) obsession with the insurance suit; 3) stomach problems; 4) uncontrolled spending; 5) hearing voices; 6) drinking to alcohol to sleep.

Mrs. Zambito reported that her husband's behavior has greatly concerned her in two areas. First, he "slept for a week straight" after the civil case was lost. He got up to go to the bathroom, and he slept the rest of the time. He also has difficulty thinking about anything other than the law suit with the disability carrier. He spends a lot of time talking with attorneys about the several legal matters. He was described as paranoid regarding the law suit. He did not trust the lawyers, and he thinks that there is a conspiracy among a number of people in the community and within the law firms. She does not know how to handle this, so she has agreed to the possibility of the conspiracy because she wants to be supportive. She does believe that her husband has been treated unfairly, but she does not believe that there is a conspiracy among state agencies, law firms, and insurance carriers.

Mrs. Zambito is also concerned about her husband's intermittent use of alcohol to sleep. She stated that he drinks Bacardi to try to sleep. She believes that he is trying to tune-out and that this habit is unhealthy.

Dr. Zambito occasionally goes on spending sprees. In December, 1995, he spent the couple's last \$3000 to purchase a Clydesdale horse and a pig. Recently, he wanted to spend the couple's last \$20.00 going to a movie. Mrs. Zambito cannot predict when these episodes will occur.

Mrs. Zambito stated that her husband had difficulty testifying in court. She described him as extremely defensive, unlike his presentation at other times.

Mrs. Zambito stated that they share the responsibilities of the home and children. Dr. Zambito does the grocery shopping, cooking, yard work, and family finances.

### **Dr. Zambito's Version of the Charges:**

Prior to his marriage to Jennifer Zambito, Dr. Zambito dated another Utah woman. When the relationship ended, the woman is alleged to have stolen numerous items from Dr. Zambito's home, to have entered his home without permission, and to have stalked/threatened him. Dr. Zambito reported the thefts to the police, but the police were said to have taken no action. Dr. Zambito stated that he filed a number of insurance claims to cover the losses because he believed that no action would be forthcoming to recover the property. The ex-girlfriend became involved with the police, and a warrant was obtained to search Dr. Zambito's home and storage shed. The police took items that they believed were falsely claimed. Dr. Zambito indicated that there were multiple errors in the listing. For example, he purchased another similar video camera similar to the one that he had claimed. He was holding the dental equipment in his home, but he intended to turn it over when the purchaser requested it.

Dr. Zambito stated that he believes that the disability insurance carrier went to the Attorney General's office and told them that he was a convicted felon and had committed insurance fraud in California. He believes that the insurance companies conspired with the local police and his ex-girl friend to get an illegal warrant to search his home. Dr. Zambito is not a convicted felon.

### **Results of Competency to Stand Trial Instrument:**

The McGarry Competency to Stand Trial Assessment Instrument was completed. This is a structured interview that is used nationally. It allows the examiner to obtain information relative to the issue of competency to stand trial. The results of the instrument must be interpreted by the examiner in the context of the statutes of the legal jurisdiction. The information below is presented to summarize the defendant's responses. For the synthesis relative to competency to stand trial in Utah, please see the Competency section at the beginning of the report.

*Appreciation of Charges:* Dr. Zambito is aware of the nature and number of charges. He is aware of the seriousness of the charges. *Rating: No Impairment.*

***Appreciation of Consequences:*** Dr. Zambito is aware that the sentence associated with conviction of felony charges is a prison sentence. He understands what probation is. He knows that he must obey the law if placed on probation, but he would not be incarcerated. ***Rating: No Impairment***

***Capacity to Challenge Prosecution Witnesses/Disclose Facts, Motives, State of Mind:*** Dr. Zambito has a good grasp of the facts of the case. He is able to describe his motives and his state of mind. He will be able to challenge prosecution witnesses. He does have difficulty however, tracking over an extended period of time and he tends to get stuck on details of lesser importance while losing sight of the overall picture. ***Rating: Mild to Moderate Impairment***

***Appraisal of Defense:*** Dr. Zambito stated that he is innocent of the insurance fraud charges. He does not have a coherent idea of how he can be defended against the charges. When asked what his attorney should focus on to defend him, he stated that he did not know. He did indicate that the police had lied to get a warrant to search his home and that the items that were listed by the police did not match the list of items that were given to the insurance company. ***Rating: Mild Impairment.***

***Roles of Others in Court Room/Adversarial Nature of Process:*** Dr. Zambito defined the role of a defense attorney as "to look after my best interests." He defined the role of the prosecutor as "To rack up statistics — make me look like a bad guy." He defined the role of the judge as to "rule on the law." He defined the role of a jury as "To give you a fair trial — decide innocence or guilt." He knew that he was the defendant in the case. He defined the role of a witness as to "Give material fact issues that pertain to the situation." Dr. Zambito was able to give reasonable definitions of the roles of court room personnel. He was aware of the adversarial nature of the process. The tone of his responses was suspicious and paranoid. ***Rating: Mild to Moderate Impairment.***

***Behavior Management:*** Dr. Zambito is aware that there are rules in the court room that he must follow. He is aware that there can be a penalty if he does not follow these rules. Dr. Zambito is unlikely to pose a significant management problem in the court, but he could be belligerent and poorly controlled without appropriate medication. ***Rating: No Impairment if Medicated.***

***Ability to Testify Relevantly:*** Dr. Zambito is marginally able to testify relevantly. Although he is highly intelligent, the untreated mental illness interferes with his ability to focus on the central issue in a discussion or question. He tends to respond far too quickly without reflection. He will answer a question before he understands it. He has difficulty tracking at present, and questions or instructions must sometimes be repeated. ***Rating: Moderate to Severe Impairment***

***Quality of Relating to Attorney:*** Dr. Zambito's relationship with his attorney is variable. He is generally suspicious of his representation, and this appears to be a symptom of the mental illness. It is impossible for him to make decisions regarding his case that he can stick with, and he does not see his case and options in perspective. With adequate medication, Dr. Zambito should be able to relate in a more consistent and reasonable manner. ***Rating: Severe Impairment***



**Ability to Take Advantage of Legal Protections:** Dr. Zambito is aware of legal protections, and he is currently able to take advantage of these. Should his illness worsen, this could change. **Rating: No Impairment**

### **Tests Administered:**

The following tests were administered: Category Test, CalCap Reaction Time tasks, Complex Figure Test (Kelly & Kelly), Grooved Pegboard Test, Memory Assessment Scale (verbal subtests), National Adult Reading Test North American Version, Structured Interview of Reported Symptoms, Speed of Language Processing, Spot the Word Test, Stroop Neuropsychological Screening Test, Test of Nonverbal Intelligence, Trail Making (A,B), Fifteen Items Word Recognition List.

### **Neuropsychological Test Results:**

Dr. Zambito presented as heavy set man who arrived either slightly early or slightly late for his appointments. He was a heavy set man who was dressed in casual rumpled clothing. He entered the examiner's office in a flurry. He appeared to be anxious, and his speech was mildly pressured. He ignored the social amenities, and he quickly launched into the issues that were of concern to him.

Dr. Zambito was cooperative with the examination. His personality style was aggressive. He was suspicious about the examination, and he expressed certainty that others would obtain the results of the examination. He stated that he was angry with his attorney for suggesting the evaluation, and he was not sure how it would benefit him. Later in the interview, he stated that he felt better about the referral. Dr. Zambito was easily distracted. He would bring up an issue that needed attention, switch to another issue, and forget the issue that needed attention. He appeared to be distracted, and he did not track what was said to him. He was told by the examiner that two hours would be required to complete the examination on another day. Despite this instruction, Dr. Zambito arrived early for the appointment and had to leave in less than an hour. He had forgotten the examiner's instruction.

Dr. Zambito had a pleasant sense of humor. His stamina was adequate. He was alert, if not overly alert. He was polite and open. Dr. Zambito has a good self-concept, but he was troubled by his current cognitive and emotional functioning. Dr. Zambito's speech production was very high. Verbal expression appeared to be easy for him. He was articulate, and he used complex language. His conversation was reality oriented except when discussing legal issues. When discussing these subjects, Dr. Zambito was more agitated and suspicious. There were no cultural or language issues which adversely affected the administration of the psychological tests.

During the formal testing, Dr. Zambito's style was mildly disruptive. He did not always focus sufficiently to process instructions, and these sometimes had to be repeated. His approach to the tasks was overly quick and non reflective. His concentration appeared to be poor.

Dr. Zambito complained of a headache that interfered with his ability to think on the tasks. He also tended to rationalize poor performance by stating that he could not focus on the task.

Mild bilateral hand tremulousness was observed. Dr. Zambito also appeared to perspire excessively. His left dominant hand was awkward. He used his right non dominant hand for drawing.

Given Dr. Zambito's reasonable level of cooperation, the current test scores are seen as reliable, valid and accurate estimates of his functioning outside a laboratory situation. Dr. Zambito's scores on concentration and memory tasks may improve when his medication level is optimal.

Individuals with Dr. Zambito's demographic characteristics are expected to score in the superior range of intellectual ability from the 79<sup>th</sup> to 90<sup>th</sup> percentile on intellectual tasks.

Dr. Zambito has a history of left hand, eye, and pedal dominance. He shifted to right hand use when he injured his left arm a few years ago. Dr. Zambito's fine motor coordination was tested using the Grooved Pegboard Test. Dr. Zambito's score was impaired with his dominant left hand (1.2%), but his score with his right hand was in the above average range.

Dr. Zambito's current non verbal intelligence was assessed using the Test of Nonverbal Intelligence. Dr. Zambito's score was 103 or 58<sup>th</sup> percentile. There were several simple concentration errors made, and his score was less than expected. His score was, however, in the above average range for the population.

Dr. Zambito's ability to concentrate was assessed with several measures. On the Stroop Neuropsychological Screening Test, Dr. Zambito did quite well. His score on Trail Making A was at the 17.6<sup>th</sup> percentile or low average range. On the Trail Making B test, a task which requires alternation between two over learned series, Dr. Zambito's score was at the population average (42.1<sup>th</sup> percentile). All of these tasks were relatively brief concentration tasks.

To measure sustained attention, the CalCAP reaction time tasks were administered. Dr. Zambito's performances were variable. His performances ranged from the severely impaired range at .1 percentile to the average/above average range. His best and worst reaction time performances varied by more than two standard deviations. These test results suggest a significant ability to sustain attention beyond a few minutes.

The Speed of Language Processing and Spot the Word Tests were given to assess Dr. Zambito. Dr. Zambito was a successful individual until he developed this devastating mental illness. premorbid language knowledge relative to his current processing speed. On the Spot the Word Test, Dr. Zambito scored at the 75<sup>th</sup> percentile in word knowledge or above average range. His ability to comprehend sentence material was at the 37<sup>th</sup> percentile or below average range. The discrepancy approached significance. This test result suggests that Dr. Zambito is not currently able to process information at a rate which is consistent with his intellectual ability.

Dr. Zambito's memory skills were assessed with the Complex Figure Test (Kelly & Kelly) and the verbal subtests of the Memory Assessment Scale. Dr. Zambito's renderings of the Complex Figure Test (Kelly & Kelly) at both immediate and delayed recall were severely impaired (1% and 4%, respectively). His verbal memory score was also impaired at the 4.2<sup>nd</sup> percentile.

Since Dr. Zambito is involved in civil and criminal litigation that are linked to his reported history of mental illness, tests designed to evaluate the possibility that Dr. Zambito's memory impairment might be malingered were administered. Dr. Zambito scored in the normal or non malingering range on both the 15 Item and Word Recognition List tasks. The validity checks on the Memory Assessment Scale and Complex Figure Test (Kelly & Kelly) were also normal.

Dr. Zambito's ability to test hypotheses in an unstructured situation was evaluated with the Category Test. Dr. Zambito's performance was in the severely impaired range for his demographic group. Dr. Zambito responded far too quickly to the items. Individuals with this level of performance have "difficulty generating a reasonable plan of action when facing troublesome issues in life."

### **Structured Interview of Reported Symptoms:**

The Structured Interview of Reported Symptoms was administered to evaluate the validity of Dr. Zambito's reported psychiatric symptoms. This index was designed to evaluate the possibility that psychiatric symptoms might be produced or exaggerated to avoid punishment.

Dr. Zambito did not endorse rare or unusual symptoms, unusual symptom combinations, improbable symptoms, or blatant symptoms. None of the scales were elevated into the probable

or definite malingering ranges. Three scores were in the indeterminate range, and five scores were in the honest range.

There was no evidence to suggest that Dr. Zambito was either magnifying his clinical symptoms or attempting to feign a psychiatric or physical illness.

### **Diagnosis (DSM-IV):**

Axis I:	296.89	Bipolar II Disorder
Axis II:	V71.09	No diagnosis on Axis II
Axis III:		headaches, stomach problems, diarrhea, left wrist injury.

### **Clinical Impression:**

Dr. Zambito reported a history of a Bipolar Disorder beginning in the early 1990's. The condition gradually worsened, and he underwent a single inpatient hospitalization. He was placed on medication to control the disorder. He was given an antidepressant and an anti-mania agent (Lithium). Based on his history, Dr. Zambito appears to have a mixed bipolar disorder with both depressed and manic episodes. He reported that the illness was under reasonable control several years ago when he was on disability. Since then, he appears to have cycled rapidly from one episode to another without full recovery during the interepisodes. The disorder does not appear to be seasonal, but it does appear to be impacted by life stressors. Mild psychotic ideation has occurred. All of the criteria for the diagnosis of both a depressive disorder and hypomania are met. Dr. Zambito's manic episodes do not appear to be full blown manic episodes which require frequent inpatient hospitalization. Rather, Dr. Zambito's manic episodes would probably be classified as hypomanic.

Dr. Zambito's situation is a tragic one. Due to the impact of the significant emotional disturbance, Dr. Zambito has spiraled downward from a respected financially secure individual to an individual who must borrow gas money to make a medical appointment. Dr. Zambito acknowledges that he has not come to peace with this difficult diagnosis, and he has not taken medication regularly. The reason given is an economic one. This may or may not be the case. It is difficult for most individuals with a Bipolar Disorder to adjust to the need to take medication. The hypomanic episodes are often pleasurable, although the repercussions are not.

Dr. Zambito's emotional disturbance may be worsening, and it is certainly not controlled. The level of the disturbance at present is such that his concentration, planning, and memory are significantly impaired. These problems should be reversed by medication.

To reach the level necessary to stand trial for the criminal charges, the following steps are required:

1. Regular psychiatric follow up (biweekly)
2. Lithium levels checked regularly
3. Lithium levels at therapeutic level for 60 days
4. Psychiatric release stating that Dr. Zambito is clinically stable and is fully compliant with appointments and medication.

It is recommended that Dr. Zambito's competence to proceed be assessed when he has been released by a board certified psychiatrist. Although his concentration and memory skills should improve with treatment, this does not occur with all patients. A brief cognitive evaluation after stabilization would be of value.

Respectfully submitted,



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